FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: June 21, 2006

SUBJECT: COMMENT: DRAFT AO 2006-14
National Restaurant Association, PAC

Transmitted herewith is a timely submitted comment by Ms. Carol A. Laham and Mr. D. Mark Renaud regarding the above-captioned matter.

Proposed Advisory Opinion 2006-14 is on the agenda for Thursday, June 22, 2006.

Attachment

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VIA FACSIMILE

Ms. Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinions 2006-14

Dear Ms. Dove:

On March 24, 2006, the National Restaurant Association PAC ("NRA PAC") requested an advisory opinion (designated AOR 2006-14) from the Federal Election Commission ("Commission" or "FEC") as to whether the NRA PAC could (1) pay for, and treat as independent expenditures, communications to the general public advocating the election or defeat of a clearly identified federal candidate and soliciting contributions for a clearly identified candidate; and (2) pay for, and treat as operating expenses, the cost of transmitting to the designated recipient candidate any contributions raised through such public communications. In making this request, the NRA PAC stated that it would have limited communications with candidate committees for the purpose of ascertaining the proper address to which to send earmarked contributions and providing certain technical information related to credit card contributions. Moreover, the NRA PAC underscored that it will not solicit or accept contributions from the general public to the NRA PAC and that no funds earmarked for candidates will be deposited into the PAC account.

On June 16, 2006, the Office of General Counsel issued for review and comment three draft opinions in response to AOR 2006-14. Draft A permits the NRA PAC to undertake independent expenditures, but forbids the PAC from soliciting the general public for earmarked candidate contributions. Draft B permits the NRA PAC to solicit the general public for earmarked candidate contributions, but states that soliciting the earmarked contributions converts an otherwise independent expenditure into a contribution. Further, Draft B requires the PAC to treat the cost of transmitting any resulting contributions as an in-kind contribution to the recipient candidate. Draft C permits the NRA PAC to solicit the general public for earmarked candidate contributions and then to use PAC funds to forward those contributions to the candidate committees. Draft C considers such activities, when conducted independently per the facts delineated in AOR 2006-14, to be

independent expenditures, which the PAC would need to report according to the FEC's schedule and rules.

It is clear that Draft C is the only opinion that is internally consistent with respect to the independent expenditure/in-kind contribution divide and is the only one that incorporates a post-*McConnell* view of our nation's campaign finance laws. Accordingly, the NRA PAC urges the Commission to adopt Draft C, or, in the alternative, to amend Draft C to permit the NRA PAC to pay the transmittal costs as an operating expense.[1]

The NRA PAC Will Not Solicit Contributions for Itself and Will Not Accept Contributions from Persons Outside of Its Restricted Class

At the outset, it is important to note that, in its request, the NRA PAC stated that it will not solicit contributions from the general public for itself. Further, it will not accept contributions from persons outside its restricted class or otherwise deposit funds solicited for candidates into its account. There is no basis for Draft A's assertion that soliciting candidate contributions that will never go through the NRA PAC's account is the same as soliciting contributions to the NRA PAC itself. Draft C, as discussed further below, recognizes the fallacies of this argument. Taken together, these two facts about the NRA PAC's plans utterly refute the proposition that the NRA PAC is "soliciting" contributions for itself from persons outside its restricted class. To the contrary, it expressly is soliciting contributions for others.

Draft C Is Consistent with Judicial Interpretation and Congressional Intent

Draft A claims that permitting a separate segregated fund to solicit earmarked candidate contributions from the general public would disrupt the "careful balance" struck by Congress in the Federal Election Campaign Act (the "Act"). However, Draft A takes a perspective of the Act that predates the Bipartisan Campaign Reform Act of 2002 ("BCRA") and *McConnell v. FEC*. Rather, Draft C recognizes the preferred position that PACs, including separate segregated funds, now occupy in the American political system. Draft C, instead of upsetting the system's

[1] The FEC's regulations subject a conduit to a host of regulatory requirements. *See, e.g.*, 11 C.F.R. §§ 110.6(b), (c); 102.8(a). Compliance with these types of requirements, including the timely transmittal of the earmarked contributions, should be reported as administrative or operating expenses by the PAC.

balance, implements the vision of the Supreme Court in *McConnell* and of Congress.

The Supreme Court viewed PACs in and of themselves to be laudable, preferred, and extremely transparent vehicles for federal political activity. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 204 (2003) ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .") (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)).

Congress shared the same view as the following passages illustrate. For example, Senator McCain opened the second day of debate on BCRA by stating:

> Well, Mr. President, we try to help PACs. We try to help political action committees because they provide us, generally speaking, with small donations that are an expression of small individuals' involvement, as opposed to the so-called soft money, which we are trying to attack. So we have tried to, in the past, make it as easy as possible for political action committees to function, rather than make it difficult.

147 Cong. Rec. S2553. According to Senator Feingold (on the same day), "The problem is not PACs. The problem isn't how PACs raise their hard money contributions. We used to think PACs were the problem." *Id.* at S2559. As a summation, Senator Bennett stated as follows: "So at least that debate is over and now PACs are good." *Id.*

Draft C Promotes Transparency and Public Information

Draft C implements judicial and Congressional decrees by permitting more, not less, PAC funds into the system, with the assurance that all PAC activity will be transparent to the general public. The alternative, as embodied in Draft A, is to shunt activity to the dark corners and away from public scrutiny—a strike against the pillar of transparency. Transparency through Draft C occurs in three respects. First, the costs of the public communications will be disclosed as independent expenditures. Second, any resulting earmarked contributions will be reported by the NRA PAC, thereby disclosing that the contributions were the result of the PAC's communications. Third, under FEC regulations, the recipient candidates must

report that the contributions were transmitted by the NRA PAC. Absent such a process, the public will not be informed of this information.

Draft C Is Internally Consistent with respect to the Independence of the Proposed Activities

All three draft opinions permit the NRA PAC to make independent expenditures that solicit contributions from the general public for clearly identified candidates and to provide in such solicitations the name and address of the campaign committee. Unlike Draft B, Draft C does not take such independent communications and transform them into in-kind contributions because of the mere fact that the communications now ask for earmarked contributions instead of simply providing the name and address of the recipient candidate committee. Draft C consistently, and rightly per the Commission's well-developed and recently revised coordination regulations, treats as independent expenditures all PAC public communications made independent of the candidate, his or her authorized committee, a political party committee, or an agent of any of the foregoing. *See* 11 C.F.R. § 109.21 (coordination rules).

Further, Draft C recognizes that a random discussion of an in-kind contribution requirement in the 1995 Explanation and Justification to a revision of the corporate facilitation rules did not enter the text of the Commission's regulations and, in any event, has been superseded by the reasoned opinion issued to WE LEAD three years ago in FEC Advisory Opinion 2003-23. The WE LEAD opinion did not require expenditures by PACs for earmarked candidate contribution solicitations always to be considered in-kind contributions. In Draft C, the Office of General Counsel acknowledges that FEC Advisory Opinion 2003-23 was not limited to non-connected committees and that the in-kind contribution discussion in the 1995 Explanation and Justification simply referred to a previous Advisory Opinion that FEC Advisory Opinion 2003-23 overturned.

Draft C Accurately Distinguishes Permissible PAC Activity from Impermissible Corporate Facilitation of Contributions

Finally, Draft C recognizes—as Draft A does not—that there is a substantial difference between soliciting earmarked contributions for a federal candidate and soliciting contributions for a PAC—especially where the PAC states that it will not accept any contributions for itself unless the contributions are from members of the PAC's solicitable class. This important distinction is embodied in the substance and

structure of the FEC's regulations. *Compare* 11 C.F.R. § 114.2(f)(3)(ii) (permitting separate segregated funds to "[c]ollect[] and forward[] contributions earmarked to a candidate") *with id.* § 114.5(i) (prohibiting separate segregated funds from soliciting contributions from the general public to the separate segregated fund).

If the Commission intended to prohibit the public solicitation of earmarked candidate contributions by separate segregated funds or to treat them the same as solicitations to the separate segregated funds themselves, the Commission could have done so in the same way that it effectively prohibits the solicitation of earmarked contributions by corporations. *See id.* § 114.2(f)(2)(iii). Instead, as noted above, there are different rules for the solicitation of earmarked candidate contributions by separate segregated funds, as opposed to their connected organizations, *id.* § 114.2(f)(3)(ii), and the treatment of any resulting candidate contributions is determined by the "direction and control" rule, *see id.* § 110.6(d). The Office of General Counsel in Draft C (at p. 10) accurately summarizes the application of the regulations to the issues at hand:

> Because an SSF may solicit, collect, and forward earmarked contributions, and because nothing in 11 CFR 114.2(f) specifically limits an SSF to conducting these activities only with respect to its solicitable class, the Commission concludes that an SSF may solicit the general public for earmarked contributions and also may then collect and forward the earmarked contributions to the designated candidates.

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CONCLUSION

For the reasons above and for the reasons previously stated in AOR 2006-14, the NRA PAC respectfully requests the Commission to adopt Draft C in answer to the PAC's request.

Sincerely,

Carol A. Laham

Carol A. Laham
D. Mark Renaud

cc: Rosemary C. Smith, Associate General Counsel